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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 73-74

FEDERAL MARITIME BOARD,
Petitioner,
v.
ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, ET AL.,
Respondents

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE, MITSUI STEAMSHIP CO., LTD., ET AL.
Petitioners,
v.
UNITED STATES OF AMERICA, ET AL.,
Respondents

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT, ISBRANDTSEN COMPANY, INC., IN REPLY TO THE FILING, BY THE PETITIONER, FEDERAL MARITIME BOARD, AND RESPONDENTS, THE UNITED STATES AND THE SECRETARY OF AGRICULTURE, CONTAINING EXCERPTS FROM THE SO-CALLED "ALEXANDER REPORT," AS A "JOINT APPENDIX" TO THEIR PRIOR FILED BRIEFS.

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The extraordinary filing, as a Joint Appendix to the Brief of the Federal Maritime Board and Brief of the United States and the Secretary of Agriculture,

containing excerpts from the so-called "Alexander Committee Report" should receive no attention by this Court for the following reasons.

In a "Prefatory Note" (Filing p. 1) [1] signed by the Solicitor General and by the General Counsel for the Federal Maritime Board, it is stated

> "The submission of this material," (208 printed pages) "however, carries with it no implication as to its relevance or significance in the legislative history of the Shipping Act, 1916."

The sole basis, on which all references in the briefs to that alleged "Report" are grounded, is the assertion that the "Document" is "legislative history" behind the Act.

This frank admission of Counsel, offering the Filing, should, in itself, be sufficient to relegate the filing to the category of the Board's Reply Brief, (p. 9) that the said reply brief "is precautionary only"—whatever that may mean!

If the foregoing concession were not sufficient to deter the Court from occupying its invaluable time in attending to non-"significant" and ir"relevant" offerings of litigants, the following additional considerations of said "Report" should conclusively prove its worthlessness:

1. The so-called "Alexander Report", from which the excerpts have been selected, is not in

[1] References herein to the "Filing" are to the so-called "Joint Appendix" to which this Brief is in response. All emphasis in quotations has been supplied.

any sense a Congressional Committee Report accompanying any legislation.

2. The excerpts were actually taken from a four (4) volume account of "Proceedings of Committee on Merchant Marine and Fisheries in investigation of shipping combinations under H. Res. 587, 62nd Congress", of which the first three volumes constitute testimony and evidence taken by the Committee, and the fourth volume is almost entirely merely a summary of this evidence.

3. The entire four (4) volumes of "Committee Proceedings", except perhaps for ten pages of "recommendations" at the very end of the fourth volume, were compiled by a staff member, one S. S. Huebner, hired by the Committee.

4. These four (4) volumes of "Committee Proceedings", other than the recommendations, were described by the said writer, Professor Huebner, as "a summary of data gathered by the Committee". See Professor Huebner's signed "Prefatory Note" to Volume 4 (Filing pp. 127-136) in which he refers to the entire proceeding as an "investigation" (Filing p. 129); he states further that much of the material was "obtained by correspondence with the parties involved" (Filing, p. 131); that Volume 3, for instance, is wholly occupied with responses from "consular representatives of the United States in foreign countries" in response "to a circular" sent out by "the Department of State" (Filing p. 131); that "the evidence" (obtained at the hearings, held from "January 7 to March 3, 1913") "was published in the first two

volumes of the Committee's *Proceedings*" (Filing p. 133).

Professor Huebner goes on to state (Filing p. 133-134)

"While numerous individual shippers voluntarily presented their grievances to the Committee, under promise of confidential treatment, very few were willing (*fearing retaliation*) to testify openly against the steamship line or lines upon which they were dependent for the movement of their freight.

"(7) At the conclusion of the hearings, and in view of the contentions of the *conference* line representatives and the reluctance of shippers to express their complaints openly for fear of retaliation, the Committee decided, under promise of confidential treatment, to ascertain approximately the extent to which *leading* shippers indorsed [6] the views of the *conference* line representatives."

And at page 135 of the Filing, the Professor further states,

"The following pages" [the rest of Volume IV] "represent the bringing together, in the form of a classified *summary* of all the essential *facts* obtained from all sources just enumerated." (Italics supplied)

5. The *fourth volume, alone*, of the Committee *Proceedings* was published as *H. Doc.* 805, 63rd Cong., 2d Sess., only with *special authorization* of the House of Representatives, which authorization would not have been necessary if the document had been a legislative *report*. We emphasize

that only Volume IV was directed to be printed, and as a "Document", and none of the four (4) volumes were authorized to be printed as a "Report."

6. This entire "summary" of evidence, compiled by Professor Huebner, which has been erroneously referred to as the "so-called Alexander Report", was not specifically endorsed by any member of the Committee, which is not surprising because when Volume IV was printed, in 1914, fifteen (15) of the twenty-one (21) members of the then House Committee had not been members of the Committee when the hearings were conducted.

Isbrandtsen, as Respondent in both proceedings herein, feels compelled to answer this filing because of the erroneous impression it attempts to convey, by referring to a "summary" of evidence and a compilation of testimony, prepared by a hired employee of the Committee, as a Congressional "Report". As pointed out in the original Brief of Respondent, Isbrandtsen, there is nothing in this four volume account of Committee Proceedings that could conceivably lend any support to Petitioners' position. These Committee Proceedings, however, are not even entitled to consideration by this Court, as valid "legislative history". At most, the "so-called Alexander Report" is in the same status as printed volumes of ordinary committee *hearings*, which certainly have little persuasive force in determining legislative intent, especially when such hearings were not held in connection with any draft of legislation, and contain no statement of even one committee member.

The "excerpts" from Committee Proceedings contained in the Joint Appendix, in short, have no relevancy in the "legislative history" of the Shipping Act, even if such resort to legislative history were necessary or "helpful", which we believe it is not.

Respondent, Isbrandtsen, undertakes, below, to show how irrelevant and insignificant this material really is. Isbrandtsen, of course, has had no previous opportunity to answer this filing, a final page proof of which was delivered to the undersigned on November 7, 1957. We first became aware of the plan of the Federal Maritime Board to file such a document, however, when telephoned by the Board's "Special Counsel", asking Isbrandtsen to join in it. For reasons explained in the following discussion, concerning the nature of the "so-called Alexander Report", Isbrandtsen's consent thereto was refused. On October 23, 1957, Isbrandtsen's Counsel sent a letter to the Board's "Special Counsel", with copies to all parties and to the Clerk of this Court, which letter is attached hereto as "Exhibit A", explaining in detail Isbrandtsen's objections to the proposed filing. The Memorandum referred to in said letter is incorporated and set forth below, as a part of this Brief.

What the So-Called "Alexander Committee Report" Really Is

In an effort to avoid the clear words of the statute, and the unqualified recommendations in *the only official Congressional Committee Reports*, the adherents of the exclusive-patronage contract/non-contract dual-rate system, including the Federal Maritime Board, have

long indulged in the subterfuge of placing all emphasis upon the printed proceedings conducted by the House Committee on Merchant Marine and Fisheries in 1912 and 1913. The account of these proceedings was published in four volumes prepared by Professor S. S. Huebner, the expert consultant to the Committee. The first three volumes constitute a summary of the evidence and testimony presented to the Committee, and the fourth volume prepared by Professor Huebner is a final summary of the data obtained. This compilation of data accompanied no draft of legislation, and only at the very end of volume IV did the Committee—or probably more exactly Chairman Alexander—submit ten pages of "recommendations" for legislation. No other parts of the four volumes were endorsed by the House Committee, or even any member thereof, because these volumes constituted merely a summary of the evidence prepared by the Committee's hired assistant, Professor Huebner.

There were only two Congressional Committee Reports accompanying the final Shipping Bill, H.R. 15455, 64th Congress, 1st Session, which bill became the Shipping Act of 1916. Neither the House Report (H. Rept. No. 659, 64th Cong., 1st Sess., May 9, 1916) nor the Senate Report (S. Rept. 689, 64th Cong., 1st Sess., July 19, 1916) contains any discussion whatsoever of any exclusive-patronage system employed by steamship conferences other than the exclusive-patronage deferred-rebate system which was outlawed by the Bill and the Act. Both of these Reports are rather short, and each Report contains the following sweeping recommendation concerning any exclusive-patronage re-

bating practice or the employment of preferential rates:

> "That rebating of freight rates to shippers be made illegal, and that, with due regard to the proper loading of the vessel and the tonnage available, discrimination between shippers or ports in the matter of rates and space accommodations be prohibited. In this connection, it is the belief of the committee that water carriers should be required to charge equal rates to all shippers irrespective of the volume of freight offered for shipment."

It is extraordinary that over the years the supporters of the exclusive-patronage system have erroneously referred to the entire assemblage of data presented to the House Committee during the Sixty-second Congress, *in 1912 and 1913,* which was summarized by a Committee staff member, as the so-called "Alexander Committee Report", ignoring in the process the *only two actual Committee Reports* that were printed and which accompanied legislation.

The actual status of this so-called, but misnamed, "Alexander Committee Report" completely refutes the attempts by the Board and the Conferences to elevate it to the position of the extreme authority, supreme even to the very words of the Shipping Act itself. These four volumes, consisting merely of an account of the House Committee *Investigation,* under the Chairmanship of Joshua W. Alexander of Missouri, *in the Sixty-second Congress,* were called, *"Proceedings of Committee on Merchant Marine and Fisheries*

in investigation of shipping combinations under H. Res. 587 (62nd Congress)". See *U. S. Catalogue of Public Documents of 63rd Cong.,* Vol. 12, p. 1782. On February 17, 1914, Representative Barnhart offered several resolutions to have certain documents printed (51 *Cong. Rec.* 3551). Among these resolutions were:

(1) 15,000 copies of "Hygiene of the Painter's Trade",
(2) 55,000 copies of "Rules of procedure in probate matters, adopted by the county judges of the five civilized Tribes portion of Oklahoma",
(3) 9,200 copies of an account of hearings on woman suffrage, and
(4) 4,540 copies of *volume 4* of the Alexander Committee Proceedings.

Specifically, the resolution offered by Mr. Barnhart was as follows (51 *Cong. Rec.* 3551, February 17, 1914):

"*Mr. Barnhart.* Mr. Speaker, I offer the following privileged resolution,

"The Clerk read as follows:

"'House resolution 402 (H. Rept. 217)

"'*Resolved,* That the Committee on the Merchant Marine and Fisheries be, and is hereby, authorized to have printed 4,540 copies of volume 4 of the *Proceedings of the Committee on the Merchant Marine and Fisheries in the investigation of shipping combinations,* under H. Res. 587 of the Sixty-second Congress, second session.

"'With the following committee amendment:
"'In line 3, strike the words "four thousand and five" (sic.) and insert the words "twenty-nine".'"

It should be noted that Representative Barnhart did not refer to Volume IV of the Committee "Proceedings", which was ordered printed, as a *Report* of the Committee. If it had been a Report of the Committee, it would have been printed in the normal course under the House Rules without any special resolution. Thereafter, *Volume IV of the Proceedings* was given a *House Document Number*, and while the title page of this volume was entitled "Report", there was the special notation, however, that it had been prepared by Professor S. S. Huebner. The *U. S. Catalogue of Public Documents of the 63rd Congress* (at p. 1782), after listing the "Proceedings of the Committee on Merchant Marine and Fisheries etc." has the following listing:

"———Same, with title, Report of Committee on Merchant Marine and Fisheries on steamship agreements and affiliations in American foreign and domestic trade, under H. Res. 587 (62nd Congress), *prepared by S. S. Huebner*, including recommendations of committee. 1914. XV No. 459 p. 5 pl. (H. doc. 805, 63d Cong. 2d sess.) In V. 154: 6751."

Although Volume IV of the House Committee Proceedings was referred to as a "Report", it is clear that it was not a Report of a Congressional Committee in the ordinary legislative sense. For example, H. R. Rept. No. 659, 64th Cong., 1st Sess. (the only *real*

Alexander Committee Report) starts out in the ordinary way of Congressional Committee Reports, *viz.*:

> "Mr. Alexander, from the Committee on the Merchant Marine and Fisheries, submitted the following:
>
> "REPORT
>
> "(To accompany H. R. 15455)"

H. R. Doc. 805, 63rd Cong., 2d Sess. (Volume IV of the Committee Proceedings), does not start out in this way, and of course it accompanied no legislation. This document does not state that it was *submitted* by Mr. Alexander and the Committee, or by either, although at the end of the document, J. W. Alexander, Chairman, did sign *only* the Committee "recommendations" as "Respectfully submitted".

Volume IV of the Committee Proceedings, which alone is reprinted as H. R. Doc. 805, 63rd Cong., 2d Sess., starts out with a "Prefatory Note", *signed only by "S. S. Huebner"*. This Prefatory Note" begins as follows:

> "The following report on 'Steamship Agreements and Affiliations in the Foreign and Domestic Trade' represents a *summary of the data* gathered by the Committee on the Merchant Marine and Fisheries in its investigation of steamship combinations under House Resolutions 425, introduced by Mr. Rufus Hardy of Texas, on February 24, 1912, and 587, introduced by Mr. J. W. Alexander of Missouri, Chairman, on June 18, 1912."

The "Prefatory Note" then goes on to explain the methods of procedure of the investigation and the sources of the data obtained.

In this prefatory note, at page 5 of H. R. Doc. 805, the following statement is made by Professor Huebner:

> "At the conclusion of the hearings, and in view of the contentions of the conference line representatives and *the reluctance of shippers to express their complaints openly for fear of retaliation,* the Committee decided, under promise of confidential treatment, to ascertain approximately the extent to which leading shippers indorsed the views of the conference line representatives."

Professor Huebner goes on to explain that the Committee sent out a circular letter to 2,000 shippers and received 300 replies, which replies were summarized and classified "in volume 2 (pp. 1397-1408) of the Committee's Proceedings".

At the end of the Prefatory note (page 7 of the H. R. Doc. 805), there is a brief section entitled "Plan and Purpose of the Report", which states in part as follows:

> "The following pages represent the bringing together in the form of a classified summary, of all the essential facts obtained from all sources just enumerated. In view, however, of the constant changes occurring in the relations between at least some of the hundreds of steamship lines involved

in the investigation, it should be noted that *this report presents the facts as they existed at the close of the hearings* and the receipt by the Committee of the answers to the Schedules of Inquiries addressed to the steamship lines, the railroads, and our diplomatic and consular representatives."

In view of these remarks, therefore, and from a study of the so-called "Report" itself, it is clear that this document is merely intended to be a *"summary of all the essential facts obtained" by the Committee,* which summary was prepared by a Committee staff member, Professor Huebner. Nowhere in the summary of the evidence, of course, is there contained any *recommendation of the Committee,* and furthermore, there is no indication that the summary was endorsed by any committee member. Such a summary of facts before a Congressional Committee could hardly constitute valid legislative history.

H. R. Doc. 805 contains 424 pages, not including the index. The "summary" of the evidence prepared by Professor Huebner covers 412 pages. The "recommendations" of the Committee, separated from Professor Huebner's summary by a blank page, begin on page *415* and cover only ten pages. *These recommendations are the only part of this entire document containing any notation that they are "submitted" by the committee or any member thereof.* As contrasted with the first part of the document, containing Professor Huebner's "summary" of the evidence, the Commit-

tee's recommendations are separated and start out with the following prefatory remark, after referring to the authorizing resolution:

> "In compliance with the directions of the resolution relating to legislation, the Committee submits the following recommendations:"

It is true that the recommendations of the Committee do refer to Professor Huebner's summary of the evidence as a "report", but it is also clear that the word was not used to mean a legislative report. References to Professor Huebner's Report are merely made in the nature of references to a record before the Committee. The Committee, in referring to Professor Huebner's Report, did not make any reference such as

> the foregoing committee report,

or to the

> accompanying report of your committee,

the usual references employed when a committee is referring to its own report, but on the contrary; all of the references are given in the following form:

> ". . . see pp.—— to —— of the foregoing report."

It is not surprising that the Committee did not specifically endorse Professor Huebner's "summary" of the evidence, as contained in *his* report, because the hearings were conducted by the Committee on the Merchant Marine and Fisheries of the *Sixty-second* Congress, as explained on the inside of the Title Page

of H. R. Doc. 805, but Volume IV of the Committee Proceedings (H. R. Doc. 805) was prepared and printed in the second session of the *Sixty-third Congress*. Of the original nineteen (19) members of the Committee, when the hearings were held and the evidence was compiled, only Chairman Alexander and five (5) other Congressmen were holdovers on the twenty-one (21) man committee during the 63rd Congress. Fifteen (15) of the twenty-one (21) members of the House Committee in the Sixty-third Congress, therefore, had not been members of that Committee when the hearings were conducted, upon which Professor Huebner prepared his "summary" of the evidence. At the time that the House Report on the final Shipping Bill was presented (H. Rept. No. 659, 64th Cong., 1st Sess., accompanying H. R. 15455, May 9, 1916), there had been a further attrition of original Committee membership. In other words, from the time of the hearings by the House Committee, during the Sixty-second Congress, until the passage of H. R. 15455, during the Sixty-fourth Congress, there had been almost a complete turnover in Committee membership.

It is fantastic, under these circumstances, that the Board and the Conference should continuously persist in the delusion that the "summary" of *evidence, prepared by Professor Huebner* and contained in the Committee Proceedings held during the *Sixty-second Congress*, constitutes the "Alexander Committtee Report". Much of the evidence, so summarized by Professor Huebner, as Professor Huebner himself admitted, constituted merely the self-serving statements of

the Conferences' own witnesses. There was great difficulty in obtaining shipper testimony, because of the shippers' "fear of retaliation".

Admittedly some of the "summary" of evidence in Volume IV of Committee Proceedings contained in the original Committee Proceedings may have been considered in drafting the final legislation. Certainly, the Committee's original "recommendations" of ten pages, submitted by the Committee at the end of Volume IV (H. R. Doc. 805) were important, and these recommendations were reprinted in both the House and Senate Reports accompanying the final Shipping Bill; but these specific "recommendations" of the Committee are overlooked by the Board and Conferences, and all emphasis is placed rather on Professor Huebner's "summary" of *evidence*.

Other hearings were held on the Shipping Bills, after the original House Committee Proceedings. The original Shipping Bill, H.R. 17328, was not introduced until January 29, 1915, approximately a year after the original Committee Proceedings were prepared, and hearings were held from February 10 to March 9, 1915 (53 *Cong. Rec.* 8074). Additional hearings were held between April 13 and 22, 1915. Various other shipping bills were subsequently introduced and considered H.R. 18518, 63rd Cong., H.R. 3728, 63rd Cong.; H.R. 450, 64th Cong.; H.R. 10500, 64th Cong; H.R. 14337, 64th Cong.; H.R. 15455, 64th Cong. (The final Shipping Bill); and H.R. 15565, 64th Cong. Hearings on H. R. 14337, entitled "Reg-

ulatory Features of Shipping Bill", were held before the House Committee between April 13 and 22, 1916, at which hearings Professor Emory R. Johnson, one of the drafters of the bill testified. When the final Shipping Bill was debated on the floor of the Senate, Senator Cummins expressed great concern that ordinary rebates "just as obnoxious to common sense and good reason" as deferred rebates might be permitted. Senator Fletcher explained that such a result would not occur and quoted the remarks of Professor Johnson before the House Committee, in his testimony on H.R. 14337, on April 13, 1914 (53 *Cong. Rec.* 12449).

There is no support anywhere in this entire legislative history for the Board and Conference position. The only flimsy basis for their arguments is manufactured from a perversion of language appearing in the *"summary" of evidence, prepared by Professor Huebner.* All subsequent evidence collected by the Committee that drafted the bill, the actual Committee Recommendations, and the only real Congressional Committee Reports are ignored. The Board and the Conference have attempted to lend legitimacy to their arguments by referring to the entire four volumes of the original House Committee Proceedings, containing a *"summary" of evidence* prepared by Professor Huebner, as "the Alexander Committee Report", and have even erroneously referred to this entire four-volume assemblage as H.R. Doc. 805, even though only volume IV was so printed.

There is no question that the members of the Congress, as well as the members of the House Committee,

considered Professor Huebner's four volume Report as merely a "summary" of evidence, as Professor Huebner himself had characterized it. In a hearing on the "Regulatory Features of Shipping Bill" (H.R. 14337) held before the Alexander Committee *on April 22, 1916*, Representative Rufus Hardy of Texas, a former Judge and the then ranking majority member of the Committee, referred to the now so-called "Alexander Committee Report" as "the *evidence* that was taken before this Committee consisting of *four* volumes". (page 174 of Hearings on H.R. 14337, 64th Cong., 1st sess.)

In summary, no part of the four volumes of House Committee Proceedings, erroneously called by the Board and the Conference, "the Alexander Committee Report", is, in any sense, a legislative *report*, and while the last ten (10) pages of Volumes IV, the "recommendations", could be considered as the utterances or suggestions of the Committee, or perhaps rather its Chairman, the balance of the four (4) volumes are not in any way entitled to be characterized as reliable or valid "legislative history" or to be called to the attention of any Court as such.

Conclusion

For the reasons set forth above, Respondent, Isbrandtsen Company, Inc., respectfully urges this Court to disregard the expurgated version of the "Proceedings of Committee on Merchant Marine and Fisheries in investigation of shipping combinations under

H.Res. 587, 62nd Congress", which material has been filed as a "Joint Appendix" to the Briefs of the Petitioner, Federal Maritime Board, and the Respondents, United States and the Secretary of Agriculture.

Respectfully submitted,

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WASHINGTON, D. C.
NOVEMBER 7, 1957.

Certificate

I, John J. O'Connor, Counsel for Isbrandtsen Company, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1957, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies to their offices in duly addressed envelopes with postage prepaid, or by delivery to them in person.

JOHN J. O'CONNOR.